Filed 6/8/10 In re Mary C. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Mary C., A Person Coming Under the Juvenile Court Law.	B219753 (Los Angeles County Super. Ct. No. CK22838)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ROBERT C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Stanley Genser, Juvenile Court Commissioner. Affirmed as modified with directions.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Robert C., father of Mary C. (Father), appeals the juvenile court's orders sustaining a Welfare and Institutions Code section 387 supplemental petition and detaining Mary in foster care.[1] The issues raised on appeal relate solely to the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., (ICWA)). We conclude that the Department of Children and Family Services (DCFS) failed to provide notice as required under its provisions. Following accepted procedure, we do not reverse the orders, but remand for ICWA compliance.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Original Petition*

The current proceeding commenced in March 2009, when Mary, then age 13, alleged that Father had been physically and verbally abusive.[2] DCFS filed a section 300 petition alleging serious physical abuse on the part of Father. Mary was detained in a foster home. Within a few days of the placement, the foster mother asked that Mary be removed from her home due to misbehavior. By May, Mary was residing in her third foster home. The caseworker received evidence that Mary was involved with drugs, truancy, and shoplifting and had been suspended from school. In addition, Mary's report that she had been hospitalized due to having been severely beaten by Father was contradicted by hospital records showing that she had been admitted suffering from gastroenteritis and dehydration.

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[1] Undesignated statutory references are to the Welfare and Institutions Code. We elect to refer to the parties by their first name and last initial. (See *In re Edward S.* (2009) 173 Cal.App.4th 387, 392, fn.1.)

[2] The family was previously involved with DCFS in 1995, due to allegations of neglect on the part of Mary's mother, Marcia D. (Mother). When jurisdiction terminated in that proceeding, sole custody was awarded to Father.

The caseworker concluded that Mary was "in need of immediate and intensive mental health services."

The jurisdictional hearing was held in May 2009. The court struck the petition's allegations of physical abuse and made a single finding that related to Father:[3] "The minor . . . has emotional and behavioral problems, and . . . [Father] has a limited ability to handle these problems. Additionally, there exists a parent-child conflict between the minor and [Father] requiring DCFS intervention and services. Such limited ability by [Father] to handle the minor's problems, and the existing parent-child conflict, endangers the minor's physical and emotional health, safety and well-being, and places the child at risk of physical harm, damage and physical abuse." The court placed Mary in Father's home under the supervision of DCFS.

B. *Supplemental Petition*

In June 2009, a month after the jurisdictional/dispositional hearing, Father advised DCFS that he could no longer control Mary and asked that she be re-detained. A few days later, interviewed by the caseworker for the detention report, Father changed his mind and asked that Mary be returned to his care. However, by this time, Mary had made fresh allegations of physical abuse against Father and also alleged that Mother, who was permitted supervised visitation only, had been living in Father's home. Mary was detained and once again moved from placement to placement, as foster families found her difficult to care for and she repeatedly ran away.

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[3] The court also found that Mother had a history of substance abuse that rendered her incapable of providing care for Mary, endangered Mary's physical and emotional health and safety and placed her at risk of physical and emotional harm.

At the August 20, 2009 hearing on the supplemental petition, the court found that Father was unable to provide Mary with ongoing care and supervision because of Mary's special needs, and that Father had allowed Mother to frequent the home and have unlimited access to Mary in violation of court orders. Counsel for Father contended that the allegations, even if true, did not create section 300 jurisdiction or establish that Mary was at risk of substantial danger if left in Father's home, and further contended that DCFS had not made reasonable efforts to prevent or eliminate the need for removal. Counsel for DCFS and Mary asked that Mary remain placed in her current foster home. The court detained Mary in foster care and ordered reunification services for Father and Mother.

C. *Proceedings Relating to ICWA*

Prior to the March 2009 detention hearing, Father submitted a "Parental Notification of Indian Status" form, which (1) stated "I may have Indian ancestry through paternal grandfather"; (2) gave the grandfather's full name; and (3) identified the grandfather's tribe as "Apache." Although the court stated on the record at the March 13 detention hearing that DCFS "needs to send notice to all Apache Tribes, [the] Bureau of Indian Affairs, and [the] Secretary of the Interior," the minute order stated "[t]he court makes inquiries of parent(s) present and finds parent(s) are not members of any American Indian tribe." Accordingly, no ICWA notices were sent.

Father appealed the orders made at the August 20, 2009 hearing on the supplemental petition. The only issues raised on appeal pertain to failure to give ICWA notice.

DISCUSSION

ICWA was passed by Congress to cure "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) Under ICWA, an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) If the court or DCFS is given reason to know that an Indian child is involved, DCFS must notify all tribes of which the child may be a member of the pending proceedings and the right to intervene. (§ 224.2, subds. (a), (b); *In re Brooke C.* (2005) 127 Cal.App.4th 377, 383.) In many circumstances, notice must also be sent to the Secretary of the Interior and/or to the Bureau of Indian Affairs. (See § 224.2, subd. (a)(4).) According to statute, "no proceeding" shall be held until at least 10 days after receipt of notice by the child's tribe. (§ 224.2, subd. (d); see also 25 U.S.C. § 1912(a) [specifying that no foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by relevant tribe].)

Father contends DCFS failed to give notice as required by ICWA and that this failure invalidated the orders issued at the hearing on the supplemental petition. Respondent does not dispute that after Father provided the information concerning his paternal grandfather's possible membership in an Apache tribe, DCFS failed to give notice to the tribe or tribes of which Mary might be a member, the Bureau of Indian Affairs or the Secretary of the Interior. Respondent contends, however, that (1) Father forfeited the issue by failing to raise it in the juvenile court; and (2) the information provided by Father was insufficient to trigger ICWA notice requirements. Alternatively, respondent contends the proper remedy for

failure to comply with ICWA is limited remand with directions, not reversal of the orders appealed. We address these issues in turn.

A. *The ICWA Notice Issue Was not Forfeited*

An ICWA notice issue is not forfeited merely because the parents failed to raise it in the juvenile court. (*In re B.R.* (2009) 176 Cal.App.4th 773, 779; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231-232; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257-258.)[4] "The purposes of the notice requirements of [ICWA] are to enable the tribe to determine whether the child is an Indian child and to advise the tribe of its right to intervene. The notice requirements serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived [or forfeited] by the parent." (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267, quoting *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) "'[I]t would be contrary to the terms of . . . [ICWA] to conclude . . . that parental inaction could excuse the failure of the juvenile court to ensure that notice . . . was provided to the Indian tribe named in the proceeding.'" (*In re B.R., supra*, 176 Cal.App.4th at p. 779, quoting *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.) Moreover, """[ICWA] [n]otice is mandatory, regardless of how late in the proceedings a child's possible Indian

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[4] In *In re S.B.* (2005) 130 Cal.App.4th 1148, cited by respondent for the proposition that failure to give ICWA notice can be forfeited by the parent, notice was given, and the tribe intervened and approved the department's placement choice. The mother thereafter sought to invalidate the court's findings and orders that predated notice. The court held that because the tribe had intervened and *not* sought to overthrow prior rulings, the rationale of protecting the tribe's interests no longer applied and the issues belatedly raised by mother had been "waived." (*Id.* at pp. 1159-1160.) The holding in *In re Miracle M.* (2008) 160 Cal.App.4th 834, also cited by respondent, is to the same effect. There, ICWA notice was sent to the relevant tribe, but the department inadvertently did not send copies to the parents. Because the tribe's interests were not involved, the court held there was no prejudice and that the parents waived or forfeited the issue.

heritage is uncovered. [Citations.]" [Citation.]'" (*In re Suzanna L., supra*, 104 Cal.App.4th at p. 231, quoting *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111.) Proceedings in this matter are far from over. If it proceeds in the usual fashion, there will be ample time to comply with ICWA notice requirements before termination of jurisdiction.

B. *The Information Provided Was Sufficient to Trigger the ICWA Notice Requirements*

With respect to the sufficiency of the information provided by Father, courts agree that "'[t]o maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child. [Citation.]'" (*Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at p. 257, quoting *In re M.C.P.* (1989) 153 Vt. 275 [571 A.2d 627, 634-635]; accord, *In re Merrick V.* (2004) 122 Cal.App.4th 235, 246; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) The notice requirements are triggered where a parent expresses the belief that he or she has Indian heritage and names the tribe or identifies a parent or grandparent who may have been Indian. (See, e.g., *Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at p. 257 [father stated he "may have" Cherokee Indian heritage; mother stated she had Cherokee Indian heritage on her maternal side]; *In re Miguel E., supra*, 120 Cal.App.4th at pp. 549-550 [father said he "'maybe'" had Indian heritage through Apache tribe].)

Respondent's argument that Father's representations were insufficient is based on a misunderstanding of the holding of the case on which it purports to rely -- *In re Alice M.* (2008) 161 Cal.App.4th 1189 -- and a misstatement of the information provided by Father on the Parental Notification of Indian Status form. The court in *In re Alice M.* did not hold, as respondent asserts in its brief, that

"recent changes to the California Rules of Court illuminate the Legislature's intent to impose a heightened standard for notice that is distinct from the standard that triggers only inquiry into Indian child status." (Quoting *id*. at p. 1200.) The quoted language represented the court's summary of the *respondent's argument* in that case, where the father had stated on the form concerning the minor's Indian status: "'American Indian, Navajo-Apache.'" (*Id*. at p. 1194.) The court held that the information provided "gave the court reason to know that [the minor] *may* be an Indian child" (*id*. at p. 1198), and specifically rejected the argument made by respondent "that the type of information provided [by father] . . . triggered only a duty of inquiry and not of notice" (*id*. at p. 1200).

The court in *In re Alice M*. went on to explain that a truly ambiguous statement on the part of the parent -- "'I think my grandfather has some Indian blood'" or "'My great-grandmother was born on an Indian reservation in New Mexico'" -- might trigger a duty of inquiry only. Here, however, Father did not merely state "'I may have Indian ancestry'" as respondent states in its brief. Father also identified the tribe and provided the name of the possible member and his relationship to the child. This information was sufficient to trigger the notice requirement.

C. *Although Remand Is Necessary for ICWA Compliance, the Court's August 20, 2009 Orders Need not Be Reversed*

The parties dispute the ramifications of failure to comply with ICWA at this stage of the proceeding. Father asks that the court's August 20, 2009 orders be "vacated" and the matter remanded "with instructions that a new hearing be held after compliance with ICWA notice requirements . . . ." Respondent asserts that the proper procedure is to remand with directions to comply with ICWA notice

provisions and to thereafter "proceed in conformity with . . . ICWA" should Mary be found to be an Indian child. Respondent is correct.

A clear majority of courts, including this one, has held that failure to comply with ICWA does not represent jurisdictional error, and that orders entered during the period of noncompliance, although patently in violation of the requirement that "[n]o proceeding" be held until at least 10 days after receipt of notice by the tribe or other pertinent party (§ 224.2. subd. (d)), are not void. (*Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268, and cases cited therein.) However, there is a split of authority concerning how to proceed when ICWA error is uncovered on appeal. According to one court, ICWA error requires the order appealed to be conditionally reversed and reinstated only if the juvenile court makes the determination that the minor is not an Indian child. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 785 ["[T]he failure to give ICWA notice means that the orders in this case cannot stand."].) Two others have held that unless the order appealed is one terminating parental rights, the order may be affirmed with directions to the juvenile court to ensure compliance with ICWA notice requirements; thereafter, if the minor is determined to be an Indian child, interested parties are permitted to petition the court to invalidate orders which violated ICWA provisions (*In re Brooke C., supra*, 127 Cal.App.4th at p. 385; accord, *In re Veronica G.* (2007) 157 Cal.App.4th 179, 187-188). We are persuaded that the procedure outlined in *In re Brooke C.* is preferable to conditional reversal. There is no guarantee or even strong likelihood that a tribe will claim Mary as a member. If Mary is determined to be an Indian child, even if the determination occurs late in the proceeding, Father will have an opportunity to petition the juvenile court to invalidate the orders made at the hearing on the section 387 petition to the extent

they violated ICWA.[5] (25 U.S.C. § 1914; see § 224, subd. (e); *In re K.B.*, *supra*, 173 Cal.App.4th at p. 1282.)

DISPOSITION

The court's August 20, 2009 orders are affirmed. The matter is remanded with directions to the juvenile court to order DCFS to comply with the notice provisions of ICWA. If, after proper notice, Mary is determined to be an Indian child, Father or any other interested party is entitled to petition the court to invalidate orders which violated ICWA.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.

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[5] Among other things, ICWA requires that before removing an Indian child from his or her home, the court must find that "active efforts" were made to prevent or eliminate the need for removal and make a determination that "these efforts have proved unsuccessful." (§ 361, subd. (d); see *In re K.B.* (2009) 173 Cal.App.4th 1275, 1282.)